

BRB No. 99-1173 BLA

MARY LESHINSKY )  
(Widow of ROBERT LESHINSKY) )  
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 Claimant-Respondent )  
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 v. )  
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 CONSOLIDATION COAL COMPANY )  
 )  
 Employer-Petitioner )  
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 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED ) DATE ISSUED: \_\_\_\_\_  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0016) of Administrative Law Judge Michael P. Lesniak awarding benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited the miner with forty-two years of coal mine employment and found the existence of pneumoconiosis arising out of coal mine employment pursuant to employer's stipulations, Hearing Transcript at 6-8. Decision and Order at 3. Applying the regulations at 20 C.F.R. Part 718, the administrative

law judge found that claimant<sup>1</sup> established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), citing *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Decision and Order at 8-9. Accordingly, benefits were awarded, commencing July 1, 1997. Decision and Order at 9.

On appeal, employer contends that the administrative law judge erred in weighing the medical opinions pursuant to Section 718.205(c). Employer's Brief at 7-19. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.<sup>2</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.205(c), the administrative law judge accorded "greater

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<sup>1</sup>Claimant is Mary Leshinsky, widow of Robert Leshinsky, who filed her claim for benefits on July 22, 1997. Director's Exhibit 1. The miner filed a claim for benefits on April 19, 1990, which was finally denied by the Benefits Review Board on March 29, 1995. Director's Exhibit 28.

<sup>2</sup>We affirm the administrative law judge's findings regarding length of coal mine employment, the existence of pneumoconiosis arising out of coal mine employment, and the date of entitlement as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

weight” to the opinion of Dr. Wecht, who found that the miner’s coal workers’ pneumoconiosis was a substantially contributing factor in his death. Decision and Order at 9.

Specifically, the administrative law judge found Dr. Wecht’s opinion to be more persuasive than the pre-autopsy death certificate<sup>3</sup> and the opinions of Drs. Kleinerman, Oesterling, Naeye, and Morgan because Dr. Wecht “has excellent credentials, his conclusions are clear and well-reasoned, and, he is the physician who actually performed the autopsy.” *Id.* Thus, the administrative law judge found that claimant has established that the miner’s death was due to pneumoconiosis pursuant to Section 718.205(c)(2), (c)(4). *Id.*

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<sup>3</sup>The death certificate, signed by the miner’s treating physician, Dr. Saradar, states that the immediate cause of death is probable acute myocardial infarction due to arteriosclerotic heart disease with hypertension listed under other significant conditions. Director’s Exhibit 8.

Employer first asserts that the administrative law judge erred in failing to resolve whether cor pulmonale was present in the miner. Employer’s Brief at 7-12. With regard to this issue, the administrative law judge stated that there is “a split among the physicians regarding the presence or absence of [ ] cor pulmonale.” Decision and Order at 9. The administrative law judge also found that Dr. Wecht’s diagnosis of cor pulmonale “is partially supported by Dr. Naeye,” and noted that Dr. Naeye attributed the miner’s “cor pulmonale entirely to congestive heart failure, *not* pneumoconiosis.”<sup>4</sup> *Id.* The evidence reveals that Dr. Wecht found cor pulmonale whereas Drs. Kleinerman, Oesterling, Morgan, and Naeye did not. Director’s Exhibits 9, 23; Claimant’s Exhibit 1 at 16-17; Employer’s Exhibit 1 at 33-34; Employer’s Exhibit 3 at 36, Employer’s Exhibit 6.

Employer asserts that the administrative law judge did not resolve the conflict in the relevant evidence on cor pulmonale, noting that all of the other physicians in the record “refute Dr. Wecht’s assertion of cor pulmonale.” Employer’s Brief at 12. As employer notes, Dr. Wecht is the only physician whose opinion is in the record, who diagnoses cor pulmonale. However, Dr. Wecht stated that he would have found pneumoconiosis to be a substantial contributing factor in the miner’s death even if cor pulmonale was not present. Claimant’s Exhibit 1 at 46. Therefore, the fact that Dr. Wecht is the only physician of record who found cor pulmonale does not affect the credibility of his findings on the cause of the

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<sup>4</sup>Employer asserts that the administrative law judge erred in stating that Dr. Wecht’s finding of cor pulmonale was partially supported by Dr. Naeye’s assessment. Employer’s Brief at 8, 12. Dr. Naeye testified that the miner may well have had some cor pulmonale, but further testified and noted in his medical report that the changes in the miner’s right heart were due to chronic heart failure not coal workers’ pneumoconiosis. Employer’s Exhibits 4, 7 at 39-40. Because the administrative law judge did not need to resolve the issue of cor pulmonale in this case before determining whether the miner’s death was due to pneumoconiosis, *see* discussion, *infra*, any error the administrative law judge may have made in stating that Dr. Wecht’s cor pulmonale diagnosis is partially supported by Dr. Naeye is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

miner's death because he states that he would have found a relationship between the miner's death and his pneumoconiosis regardless of whether cor pulmonale existed. Accordingly, we reject employer's assertion that the administrative law judge erred in failing to resolve the conflict in the evidence pertaining to the existence of cor pulmonale.

Employer next asserts that the administrative law judge erred in failing to acknowledge that Drs. Kleinerman, Oesterling, and Morgan have excellent credentials, in automatically deferring to the opinion of the autopsy prosector, Dr. Wecht, and in concluding that Dr. Wecht's opinion is most consistent with the miner's lengthy coal mine employment history. Employer's Brief at 13-15. The administrative law judge stated that he found Dr. Wecht's opinion "to be most persuasive" because he has "excellent credentials," his conclusions are "clear and well-reasoned, and, "he is the physician who actually performed the autopsy." Decision and Order at 9. While Dr. Wecht is Board-certified in anatomic, clinical, and forensic pathology, Claimant's Exhibit 1 at 5, Drs. Naeye and Oesterling are Board-certified in anatomic and clinical pathology, Employer's Exhibit 1 at 4, 5, and Dr. Kleinerman is Professor Emeritus of Pathology at Case Western University, Director's Exhibit 23, Employer's Exhibit 3 at 5-11. Inasmuch as the administrative law judge considered Dr. Wecht's credentials to be excellent without any discussion or analysis of the credentials of the other physicians, we are unable to determine whether this was a permissible basis for him to find Dr. Wecht's opinion more persuasive. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), *see generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Therefore, on remand we instruct the administrative law judge to reconsider the qualifications of all of the physicians in weighing the medical reports of record.

With regard to the issue of the miner's coal dust exposure, the administrative law judge stated that "despite the suggestion by some of the other physicians. . .the record clearly indicates that the miner had considerable coal dust exposure throughout his 42 years of coal mine employment," Decision and Order at 9, and the administrative law judge concluded that Dr. Wecht's opinion is "most consistent with the miner's lengthy history of coal dust exposure," *Id.* While Dr. Morgan noted that the miner's forty-two years of coal mine employment does not necessarily mean that he was exposed to high concentrations of dust, Employer's Exhibit 6, Drs. Kleinerman, Oesterling, and Naeye found that the miner had thirty-nine to forty-one years of coal mine employment. In addition, Drs. Kleinerman and Naeye<sup>5</sup> specifically noted that the miner was exposed to coal dust during this time.

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<sup>5</sup>Dr. Naeye noted in an earlier opinion that he did not find evidence that the miner ever mined coal and that his exposure to coal dust was nil, Employer's Exhibit 4, but at a subsequent deposition he changed his perception of the miner's coal dust exposure, *see* discussion, *supra*. Employer's Exhibit 7 at 19-20, 41.

Employer's Exhibit 3 at 26, 45, Employer's Exhibit 7 at 19-20, 41. Therefore, the administrative law judge's finding that Dr. Wecht's opinion is most consistent with the miner's lengthy history of coal dust exposure is inconsistent with the record. Accordingly, we instruct the administrative law judge on remand to reconsider his conclusion that Dr. Wecht's opinion is the most consistent with the miner's coal dust exposure history.

Moreover, the administrative law judge stated that Dr. Wecht's opinion is "most consistent" with the miner's brief smoking history, severe heart disease, cor pulmonale, and coal workers' pneumoconiosis on autopsy. Decision and Order at 9. However, the administrative law judge previously noted that all the physicians whose opinions are in the record found simple coal workers' pneumoconiosis and heart disease, *Id.* Thus, we hold that it was irrational for the administrative law judge to find Dr. Wecht's opinion to be the "most consistent" on these issues. See *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

With regard to the miner's smoking history, the administrative law judge found that the miner quit smoking more than forty years prior to his death, based on claimant's testimony. Decision and Order at 3. There was no direct testimony from claimant about the amount the miner smoked prior to quitting.<sup>6</sup> Hearing Transcript at 13. Dr. Wecht testified that he did not find a cigarette smoking history of intensity and duration. Claimant's Exhibit 1 at 36. Drs. Kleinerman and Naeye found a smoking history of one pack per day for eleven to fifteen years, Employer's Exhibit 3 at 60, Employer's Exhibit 4, and Drs. Oesterling and Morgan found a smoking history of one pack per day for fifteen years, Employer's Exhibit 1 at 46, Employer's Exhibit 6. It is unclear, without more elaboration, why the administrative law judge found Dr. Wecht's opinion most consistent with the record on this basis. Accordingly, we instruct the administrative law judge on remand to reconsider all of the relevant medical opinions in the record in conjunction with the evidence regarding the miner's smoking history and to provide an adequate rationale for crediting or discrediting a physician's opinion based on the miner's smoking history, as required by the Administrative Procedure Act. See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

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<sup>6</sup>When questioned, about whether the miner had testified before an administrative law judge that "he had smoked, maybe a package a day and gave it up when he was 29 or so," claimant replied, "[y]es he was young when he quit." Hearing Transcript at 13.

Finally, in *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992), the Board held that an administrative law judge may not mechanically, without a valid explanation, accord greater weight to the opinion of the autopsy prosector over the contrary opinions of the reviewing pathologists on the grounds that the prosector performed the autopsy. Because the administrative law judge has not provided a valid explanation for his finding that Dr. Wecht's opinion is more persuasive than the contrary opinions of the physicians who reviewed the autopsy slides, *see* discussion, *supra*, we vacate administrative law judge's Section 718.205(c) finding, *see Urgolites, supra; Wojtowicz, supra; Tenney, supra*, and remand this case to the administrative law judge for him to reconsider all of the relevant medical opinion evidence pursuant to Section 718.205(c), *see Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Lukosevicz, supra; see also Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge